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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1976

NO. 76-1692

ANNE T. HENDERSON and HELEN T. WILKES,
Petitioners

vs.

MANN THEATRES CORPORATION OF CALIFORNIA, a corporation,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DIVISION 1

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INTRODUCTION

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division 1, entered on December 28, 1976.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division 1, is printed in Appendix B hereto.

JURISDICTION

The judgment, printed in Appendix B hereto, which is sought to be reviewed was made and entered December 28, 1976.

A hearing in the California Supreme Court was denied on February 23, 1977.

The jurisdiction of this Court is invoked under Section 1257(3) of Title 28 of the United States Code.

QUESTIONS PRESENTED

1. Whether Section 3(b) of the Par Value Modification Act (the "Act"), Pub. Law 93-110, 87 Stat. 353, en. September 21, 1973, as Amended by Pub. Law 93-373, 88 Stat. 445, on August 14, 1974, and Mandating as of December 31, 1974 that no Law "May Be Construed so as to Prohibit Any Person From Purchasing, Holding, Selling, or Otherwise Dealing With Gold" (Text Set Out in Appendix A), Effectively Repealed the Joint Resolution of 1933, 31 U.S.C. §463

(Text Set Out in Appendix A), Thereby Revitalizing the Provision of a 99-year Lease Agreement Entered into in 1929 Requiring the Lessee to Pay Rent in Gold or the Value Thereof.

2. Whether, Even If the Amendment to the Par Value Modification Act supra Did Not Repeal the Joint Resolution of 1933 supra, the Joint Resolution of 1933 Now, and In Light of the Act, Violates the Due Process Clause of the Fifth Amendment of the United States Constitution in that it Creates an Arbitrary and Irrational Distinction Between Obligees for the Payment of Gold or the Value Thereof, and Purchasers of Gold in the Absence of a Contract or, in the Alternative, Obligees Under Contracts With a Gold Clause, and Obligees Under Other Kinds of Contracts Requiring Payment in Gold or the Value Thereof (e.g. Gold Futures Contracts).

CONSTITUTIONAL PROVISION INVOLVED

Amendment V, United States Constitution: "No person shall . . . be deprived of . . . liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

In 1929 the predecessors of the Petitioners leased to the predecessor of the Respondent certain property improved by a movie theatre, under a 99-year lease. The rental clause which is the subject of this lawsuit, the so-called "gold clause", provided in relevant part:

> "The lessee agrees to pay said rentals [viz., $1,250.00 per month] to the lessors in gold coin of the United States of America of the present standard of weight and fineness (one dollar containing twenty-five and eight-tenths grains of which twenty-three and twenty-two hundredths are fine gold) or its equivalent in lawful money of the United States of America, at such place in the City of Los Angeles, California, as the lessors may, from time to time, in writing, designate as the place for the payment of the rent."

Petitioners demanded that Respondent pay rent, beginning January 1, 1975, in accordance with the gold clause, and Respondent has refused to comply but, rather, has tendered the sum of $1,250.00 as the monthly rental. Thereafter, Petitioners filed the instant action seeking damages and declaratory relief in the Superior Court of Los Angeles County. Respondent answered, raising the provisions of 31 U.S.C. §463, the Joint Resolution (see Appendix A), as a defense to an obligation to pay monthly rental in excess of $1,250.00. Petitioners responded by raising the federal questions herein, namely, that the Joint Resolution was repealed by

the Amendment to the Par Value Modification Act (the "Act") (see Appendix A), and in the absence of such a finding, that the Petitioners would suffer a violation of due process as guaranteed by the Fifth Amendment to the United States Constitution. The Superior Court ruled in favor of the Defendant-Respondent, and the Court of Appeal of the State of California, Second Appellate District, Division 1 affirmed that ruling. The Court of Appeal did not expressly pass upon the due process consequences of its judgment, but it could not have affirmed the lower court's decision without resolving the constitutional issue against the Petitioners.

The federal questions were again raised in the petition filed in the California Supreme Court, the denial of a hearing by which exhausted the California remedies available to Petitioners. Douglas vs. California, 372 U.S. 353, 354 n.1 (1963).

POINT I

SECTION 3(b) OF THE AMENDMENT TO THE PAR VALUE MODIFICATION ACT REPEALED THE JOINT RESOLUTION

This petition deals solely with the effect of the Act on the Joint Resolution, with Petitioners' position based entirely on the law as it exists after the effective date of the Act and as a consequence of the Act. The case appears to be of first impression in the United States, and its decision is necessary for a determination of the kind of transactions in gold which are legal by virtue of the Act.

By the express terms of Section 3(b) of the Act, no law "may be construed to prohibit any person from purchasing, holding, selling, or otherwise dealing with gold." This language is extremely broad and permits all transactions with gold that are permitted with other common goods. Just as parties to a lease may tie the rent obligation to the market price of soybeans, they may now tie the rent to the market price of gold.

The Court below (Appendix B, p. 8) limits the scope of Section 3(b) to the use of gold as a "commodity" and concludes that the subject lease uses gold as "money" and is therefore outside of Section 3(b) and within the condemnation of the Joint Resolution. Such a commodity/money distinction is absent from the Act and is utterly unmanageable. The parties to this lease are using gold in the same sense as they would use soybeans, had the lease been based on that material. Had soybeans been the basis, it would be unthinkable that one would conclude it is an attempt to monetize soybeans. With regard to gold, the purpose and effect of the Act is to permit gold to be treated as are other goods. Thus, the subject gold clause should be as valid as one based on any other material.

If the Court is using the term "commodity" to mean that the obligee uses gold for his own business (e.g., jewelry) then Section 3(b) is worthless, because such use was permitted prior to passage of the Act (Holyoke Water Power Co. vs. American Writing Paper Co., 300 U.S. 324 (1937)).

The legislative history of the Act discloses a congressional intent to permit gold to be treated

as are all other goods. Because payments may be tied to other goods, so may they be tied to gold. If the Joint Resolution is currently in effect, it would preclude all contracts for the sale of gold, not only gold clauses. It is common knowledge that, since passage of the Act, but not before, futures contracts in gold have been publicly traded. Moreover, such contracts are not restricted to the use of gold for any particular purpose; they are made for hedging as well as for consumption. If the Joint Resolution is in effect, such contracts are currently illegal. Therefore, there is no way to explain any transactions in gold today, with the exception of a face-to-face exchange, if the Joint Resolution is now in effect.

The Court below states (Appendix B, p. 7) that because 31 U.S.C. §442, 443 were repealed by Section 3(a) of the Act and the Joint Resolution was not included therein, it follows that the latter was not repealed. If that were true then Section 3(b) would be of utterly no value. Section 442 and 443 were mentioned in Section 3(a) because they were enabling statutes, directed to Treasury Department enforcement practices. Furthermore, repeal of such laws provides no basis for the legalization of the private contracts condemned by the Joint Resolution which are being executed today (e.g. gold futures contracts).

In addition to the fact that gold clauses are treated the same as all other contracts for gold in the Joint Resolution, and, if one is presently illegal so are the others, the subject lease is precisely a gold futures contract; the lessor conveyed a leasehold in exchange for the right to future payment in gold or the value thereof. If one is an attempt to monetize gold, then so is the other.

It must also be noted that the United States Supreme Court cases cited in the Opinion, Holyoke, supra, and Norman vs. Baltimore & Ohio R.R. Co., 294 U.S. 240 (1935), dealt only with the question of the congressional power to pass the Joint Resolution in the absence of the Act. Those cases obviously did not consider whether the Act repealed the Joint Resolution or whether the passage of the Act would render the Joint Resolution violative of the Due Process Clause.

We are confronted today with Section 3(b) of the Act restoring gold to the status of other goods, thereby permitting an extremely broad range of transactions and, since its passage although not prior thereto, with the open and pervasive trading of gold futures contracts and other contracts involving gold. These transactions, as well as the subject gold clause, are clearly within the condemnation of the Joint Resolution and therefore illegal unless the Joint Resolution is no longer in effect. The opinion of the Court below does not resolve this glaring contradiction nor even address the problem. Rather the Opinion unfortunately renders the area of the law more bewildering by holding that gold may be used as a "commodity" but not as "money" and that the subject lease uses it as "money". An obligee under a gold futures contract may want gold for the same purpose as the Petitioners herein. No one can predict which kinds of transactions will be labelled as "money" and which as a "commodity".

POINT II

IF THE AMENDMENT TO THE PAR VALUE MODIFICATION ACT DID NOT LEGALIZE THE SUBJECT GOLD CLAUSE, THEN ITS PROHIBITION, IN LIGHT OF THE ACT, VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION

As explained hereinabove, it is extremely unclear, based on the opinion of the Court below, which types of transactions in gold remain illegal. There is no way to determine, based on the holding whether only gold clauses are so prohibited, or whether gold futures contracts or all contracts for gold are within the condemned category. In either event, the prohibition against gold clauses, in light of the legality of other types of dealings in gold, is utterly irrational and arbitrary and is therefore a violation of Due Process.

The Court in Norman, supra, identified the congressional concerns which prompted the passage of the Joint Resolution, at page 312, as follows:

> "The first is the tendency which has developed internally to hoard gold; the second is the tendency for capital to leave the country."

Therefore, the Court justified and rationalized the Joint Resolution as necessary to support, and prevent circumvention of, contemporaneous legislation prohibiting private possession of gold and, at page 297, characterized all of this legislation as

in pari materia. Only in light of a prohibition on holding gold did the Court in Norman and Holyoke, supra find that the Joint Resolution is not irrational and therefore not violative of the Fifth Amendment.

In the case at bar, we are confronted with a situation whereby the Joint Resolution prohibits contracts requiring payment in gold or the value thereof while parties may nevertheless buy, sell, and hold gold. Alternatively, if some kinds of contracts in gold are legal today, and this is wholly unclear based on the Court's opinion, there is no rational basis to prohibit the subject gold clause while permitting other contracts which require payment in gold. The distinction is as violative of Due Process as would be a prohibition against trying payments under a contract to the market value of, say, soybeans (called indexing) while it is legal to buy, sell, and hold soybeans, and legal to make other contracts for the sale of soybeans.

The Court below completely fails to address itself to this distinction, after the Act has been passed. Rather, the Opinion merely cites Norman and Holyoke, supra for the proposition that the Joint Resolution does not violate Due Process, although those holdings are predicated on a statutory prohibition against any kind of holding or transaction in gold, a prohibition no longer in effect.

REASONS FOR ALLOWANCE OF THE WRIT

This case appears to be of first impression in the United States. The Act upon which Petitioners rely restores gold to the same uses permitted with other goods. It makes no distinction between the use of gold for "payment" or "money" compared with use as a "commodity" nor is such a distinction manageable. If the subject gold clause is prohibited by the terms of the Joint Resolution, then so are gold futures contracts and other contracts for gold, since they are within the condemnation of the Joint Resolution and look to the same use of gold as in the instant case. The resolution of the issue will affect transactions in gold futures contracts, publicly traded after December 31, 1974, and all transfers of gold founded on contract.

If the Act did not repeal the Joint Resolution then the Joint Resolution is now, in light of the present legality of holding and dealing with gold, totally irrational and arbitrary in prohibiting gold clauses while permitting holding, buying, and selling of gold, and is therefore a violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES L. CROUCH, JR.

Attorney for Petitioners

APPENDIX A

[pp. 1-3]

The statutory development, as it pertains to this controversy is as follows. On June 5, 1933, by Joint Resolution, Congress enacted what is now 31 U.S.C. §463 (the "Joint Resolution") which provided in relevant part:

> "(a) Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against the public policy; and no such provision shall be contained or made with respect to any obligation hereafter incurred. Every obligation heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."

On September 21, 1973, Congress enacted Public Law 93-110, 87 Stat. 353, and, as amended by Public Law 93-373, 88 Stat. 445, on August 14, 1974, is known as the "Amendment to the Par Value Modification Act" (the "Act). Public Law 93-373 provided that the provisions take effect no later than December 31, 1974. Previously, the provisions would not take effect until the President acted. Critical passages of the Act are as follows:

Public Law 93-110, 87 Stat. 353:

"Sec. 3(a) Sections 3 and 4 of the Gold Reserve Act of 1934 (31 U.S.C. §§442 and 443) are repealed.

(b) No provision of any law in effect on the date of enactment of this Act and no rule, regulation or order under authority of any such law, may be construed to prohibit any person from purchasing, holding, selling, or otherwise dealing with gold.

(c) The provisions of this section, pertaining to gold, shall take effect when the President signs and reports to Congress that international monetary reform shall have proceeded to the point where elimination of regulations on private ownership of gold will not adversely affect the United States' international monetary position."

Public Law 93-373, 88 Stat. 445:

"Sec. 2. §3(b) and (c) of Public Law 93-110 (87 Stat. 352) are repealed and in lieu thereof add the following:

'(b) No provision of any law in effect on the date of enactment of this Act, and no rule, regulation, or order in effect on the date §(a) and (b) become effective may be

construed to prohibit any person from purchasing, holding, selling, or otherwise dealing with gold in the United States or abroad.

'(c) The provisions of §(a) and (b) of this Section shall take effect either on December 31, 1974, or at any time prior to such date that the President finds and reports to Congress that the international monetary reform shall have proceeded to the point where elimination of regulations on private ownership of gold will not adversely affect the United States international monetary position.'"

APPENDIX B

[pp. 1-14]

CERTIFIED FOR PUBLICATION IN OFFICIAL REPORTS

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ANNE T. HENDERSON and HELEN T. WILKES, Plaintiffs and Appellants, vs. MANN THEATRES CORPORATION OF CALIFORNIA, a corporation, Defendant and Respondent.	2d Civ. No. 48810 (Superior Ct. No. C 113808) Court of Appeal-Second Dist. FILED Dec 28 1976 Clay Robbins, Jr. Clerk Deputy Clerk

Appeal from a judgment of the Superior Court of Los Angeles County. William P. Hogoboom, Judge. Affirmed.

Charles L. Crouch, Jr. and David J. Prager for Plaintiffs and Appellants.

O'Melveny & Myers, and Phillip F. Westbrook and Bennet W. Priest, for Defendant and Respondent.

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In 1929 the owners of vacant land on Hollywood Boulevard leased the property for a term of 99 years. Plaintiffs are successors in interest to the lessors; and defendant is the successor in interest to the lessee. Plaintiffs seek a declaration that a provision in the lease that the rent be paid in gold coin of the United States of America is valid. The trial court concluded that the provision for payment of the rent in gold coin is prohibited by the "Joint Resolution of 1933" enacted by Congress (31 U.S. Code, §463); that the Joint Resolution was not repealed, expressly or impliedly, by the 1973 Amendment of the Par Value Modification Act (Pub. Law 93-110. Cong., H.R. 6912), and that defendant is not obligated to pay the rent in gold coin.

Plaintiffs (lessors) appeal from the judgment. They assert that said Joint Resolution was repealed by said 1973 Act, effective December 31, 1974, and the repeal revived the gold clause in the lease, effective on that date. They assert further if the 1973 Act did not repeal the Resolution, the Resolution violates due process of law. Appellant also makes other contentions, which relate to the contractual doctrines of "Impossibility" and "Illegality."

The case was submitted to the trial court on an agreed statement of facts. There is no controversy as to the facts. Appellants assert that the findings of fact and conclusions of law provide no basis for the judgment; and that the 1973 Amendment of the Par Value Modification Act "mandates that judgment be granted" in favor of plaintiffs. The facts (and findings) are in substance as follows:

On October 8, 1929, the predecessors in interest to the parties herein entered into a written ground

lease whereby the property was leased by the lessors to the lessee for a period of 99 years, commencing November 1, 1929. A provision of the lease was: The rental for such 99-year term shall be $1,457,500, which sum the lessee agrees to pay the lessors in installments as follows: $750 on the first day of each calendar month of said term commencing November 1, 1929, to and including May 1, 1934; $1,250 on the first day of each calendar month of said term commencing June 1, 1934, to and including October 1, 2028. "The lessee agrees to pay said rentals to the lessors in gold coin of the United States of America of the present standard of weight and fineness (one dollar containing twenty-five and eight-tenths grains of which twenty-three and twenty-two hundredths grains are fine gold) or its equivalent in lawful money of the United States of America, at such place in the City of Los Angeles, California, as the lessors may, from time to time, in writing, designate as the place for the payment of the rent. But the lessee may make such rental payments by bank check in accordance with prevailing business practices, and the place for the payment of rent shall be at the Hollywood Office of California Bank in the City of Los Angeles, California, until otherwise specified by the lessors as aforesaid."

A theatre building was constructed on the land; and through mesne conveyances, the plaintiffs are the lessors, and the defendant is the lessee, of the ground lease.

In June 1933, Congress enacted the Joint Resolution of 1933 as the result of the monetary change referred to as "going off the gold standard." Said Joint Resolution was thereafter codified in section

463 of Title 31 of the United States Code, as follows:

"Provision for payment of obligations in gold prohibited; uniformity in value of coins and currencies;

"(a) Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

"(b) As used in this section, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations. June 5, 1933, c. 48, §1, 48 Stat. 113."

Since the enactment of said Joint Resolution in 1933, the lessee has paid and is presently paying the rent due under the herein lease in legal tender money of the United States, including payment of $1,250 for the month of January 1975 and $1,250 for the month of February 1975.

In September 1973, the Congress enacted Public Law 93-110 (93rd Cong., H.R. 6912), which provides in part as follows:

"AN ACT to amend the Par Value Modification Act, and for other purposes: [¶] . . . . .

"Sec. 3. (a) Sections 3 and 4 of the Gold Reserve Act of 1934 (31 U.S.C. 442 and 443) are repealed.

"(b) No provision of any law in effect on the date of enactment of this Act, and no rule, regulation, or order under authority of any such law, may be construed to prohibit any person from purchasing, holding, selling, or otherwise dealing with gold."

In July 1974, Congress enacted Public Law 93-373 (93rd Cong., S. 2665, 88 Stat. 445) which provides in part as follows:

"Sec. 2. Subsections 3(b) and (c) of Public Law 93-110 (87 Stat. 353) are repealed and in lieu thereof add the following:

"(b) No provision of any law in effect on the date of the enactment of this Act, and no rule, regulation, or order in effect on the date subsections (a) and (b) become effective may be construed to prohibit any person from purchasing,

holding, selling, or otherwise dealing with gold in the United States or abroad.

"(c) The provisions of subsections (a) and (b) of this section shall take effect either on December 31, 1974, or at any time prior to such date that the President finds and reports to Congress that international monetary reform shall have proceeded to the point where elimination of regulations on private ownership of gold will not adversely affect the United States' international monetary position. Said provisions became effective on December 31, 1974."

The trial court's conclusions of law were in substance as follows: Enforcement of the gold clause provision of the lease pertaining to payment of the rent in gold coin of the United States is prohibited by the provisions of the Joint Resolution of 1933. Defendant is not obligated to make payment in gold coin of the weight and fineness in effect on October 8, 1929, or its equivalent in lawful money of the United States. The Joint Resolution of 1933 was not repealed, either expressly or by implication by the 1973 amendment of the Par Value Modification Act. The gold clause provision of the lease was not and is not a contract for payment in gold coin or gold bullion as a commodity, but was and is a contract for the payment of money. Defendant has fully performed all conditions of the lease to be performed on its part and has fully discharged its obligation to pay rent to plaintiffs for the months of January and February 1975.

(As hereinabove stated, defendant paid $1,250 as rent for each of those months. Plaintiffs alleged in their complaint that the rental due for

those months in gold coin or its equivalent was $19,300.)

As above stated, appellants assert that the trial court erred in concluding that the 1973 Act did not repeal the Joint Resolution of 1933, expressly or impliedly.

As above shown, section 3, subdivision (a) of the 1973 Act expressly repealed sections 3 and 4 of the Gold Reserve Act of 1944 (31 U.S.C., §§ 442, 443). No provision of the 1973 Act expressly repealed the Joint Resolution of 1933. A recognized rule of statutory construction is that the expression of certain things in a statute necessarily involves exclusion of other things not expressed -- expressio unius est exclusio alterius. (See Gilgert v. Stockton Port District, 7 Cal.2d 384 [60 P.2d 847].)

Appellants argue that subdivision (b) of section 3 of said 1973 Act impliedly repealed the Joint Resolution of 1933. Subdivision (b), as heretofore stated, provides that "No provision of any law in effect on the date of enactment of the Act, and no rule, regulation, or order under authority of any such law, may be construed to prohibit any person from purchasing, holding, selling, or otherwise dealing with gold."

Appellants assert that subdivision (b) "effectively repealed all laws restricting transactions in gold," and that legislative intent to repeal "all laws which prohibit the private purchase or dealing with gold" is shown by cited statements of a congressional committee that analyzed the bill from which the Act arose and by a cited statement by Representative Windall. One of the cited statements of the committee (H.R. Rep. No. 93-203, 93rd Cong., 1st

Secs., 2 U.S. Code Cong. and Adm. News 2050, 2052) is that said section 3 of the Act "would repeal the statutory and regulating provisions now applying to the ownership of gold . . . specifically this section would repeal sections 3 and 4 of the Gold Reserve Act of 1934, and all other laws, rules and regulations and orders which prohibit any person from purchasing, holding, selling, or otherwise dealing in gold." The other cited statement by the committee (H.R. Rep. No. 93-203, supra, 2062) is that ". . . we approved an amendment repealing Section 3 and 4 of the Gold Reserve Act, which provides . . . that regulations . . . now in effect prohibiting purchase, sale, holding or other dealing in gold, shall be repealed. . . ." The cited statement by Representative Windall is, ". . . Americans should be able to own or deal in gold as they do in any other commodity." (119 Cong. Rec. H. 16970 (2d Col.) May 29, 1973.)

As respondent states, those cited statements in effect relate to the purchase, sale, and holding of gold as a commodity. Respondent concedes that the 1973 Act abrogated statutory or regulatory provisions relating to ownership of gold as a commodity; but respondent does assert that the 1973 Act was not intended to affect the Joint Resolution of 1933, which denied gold monetary standing, e.g., for payment of debts in gold.

Contrary to appellants' assertion that the intent of the 1973 Act was to "effectively repeal all laws restricting transactions in gold," some sections of Title 31 of the United States Code remain in effect, for example, section 315b thereof which discontinues gold coinage, and section 446 thereof which provides that all acts inconsistent with said section 315b are repealed. As respondent asserts, appellants

are arguing in effect that the gold monetary standard was reinstated by the 1973 Act.

Congressional intent regarding the 1973 Act was stated by the chairman of the subcommittee which handled the bill, as follows: "I want to emphasize that this would not mean that we intend to allow the writing of contracts in gold, or otherwise change the joint resolution on gold. Our intention is merely to allow individuals to buy, sell and own gold if and when it is possible to do this without sacrificing our national interest."[1/] (119 Cong. Rec. 16968 [May 29, 1973].) A representative sponsoring the bill stated: "It is essential that the language be quite clear, that what we are proposing is simply the elimination of any impediment upon American citizens from ownership of gold." (Italics added.) (119 Cong. Rec. 16980 [May 29, 1973].)

Governmental agencies have interpreted the 1973 Act as not repealing or modifying the Joint Resolution of 1933.[2/] Administrative interpretation of a

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1/ Subdivision (c) of section 3 of the 1973 Act provides, as previously stated, that the provisions of this section shall take effect when the President finds and reports to Congress that "international monetary reform shall have proceeded to the point where elimination of regulations on private ownership of gold will not adversely affect the United States' international monetary position."

2/ For example, the Department of the Treasury issued a news release on December 9, 1974, in response to inquiries whether repeal of the restrictions on private ownership of gold affected "continuing validity" of the Joint Resolution of 1933. The news release stated in part:

statute will be afforded great respect by the courts. (Noroian v. Department of Administration, 11 Cal. App.3d 651, 655 [89 Cal.Rptr. 889].)

2/ (Con't) "Under the Resolution a contract clause providing for payment in gold, or in United States dollars equivalent to a certain amount of gold, is not enforceable if the subject of the contract is something other than gold, so that gold as a commodity has no relationship to the business being transacted. In such a case, gold would be used solely for the purpose of establishing the value of the obligation. This view is based on judicial decisions which held unenforceable a lease providing for payment in gold bullion as one method of rent settlement, since the intention of the parties by using gold in the contract was solely to stabilize the dollar value of the rent. Holyoke Water Power Co. v. American Writing Paper Co., 300 U.S. 324 (1937); Emery Bird Thayer Dry Goods Co. v. Williams, 107 F.2d 965 (1939). Similarly, loans of certificates of deposit repayable in gold, or in an amount of dollars measured in terms of gold, would be unenforceable. . . . The United States law making gold clauses unenforceable has been in effect solely during the period in which private ownership of gold by United States citizens was prohibited. Nonetheless, there is nothing inconsistent between private ownership of gold and the Gold Clause Joint Resolution." Also, the Federal Reserve Board issued guidelines as follows: " . . . obligations payable in gold are still unenforceable under the law making it illegal for banks to enter into deposit contracts giving customers an option of taking payment in cash or gold." (Government Issues Warnings on Gold Dealings, Comm. & Finan. chr. 219.2, Dec. 16, 1974.)

In Holyoke Water Power Co. v. American Writing Paper Co. (1937), 300 U.S. 324, a lease entered into prior to the Joint Resolution of 1933 provided for payment of rent in "a quantity of gold which shall be equal in amount to fifteen hundred dollars ($1500) of the gold coin of the United States of the standard weight and fineness of the year 1894, or the equivalent of this commodity in United States currency." In 1934 (after Congress passed the Joint Resolution of 1933), the lessor contended that the rent was payable in fine gold as provided in the lease, and the lessee contended that by force of the Joint Resolution the rent was payable dollar for dollar, in the then prevailing currency. The district court and the circuit court of appeals held in favor of the lessee. The Supreme Court affirmed the judgment, and said (p. 335): "The obligation was one for the payment of money, and not for delivery of gold as upon the sale of a commodity."

It was also said therein (300 U.S. at p. 337): "A contract for the payment of gold as the equivalent of money, and, a fortiori a contract for the payment of money measurable in gold, is within the letter of the Joint Resolution of June 5, 1933, and equally within its spirit." The court also rejected (pp. 340-341) an argument that the Joint Resolution, although made for protection of the monetary system, arbitrarily suppressed the rental covenant and was inconsistent with the Fifth Amendment.

The court therein concluded (p. 341): "In last analysis, the case for the petitioner amounts to little more than this, that the effect of the Resolution in its application to these leases is to make the value of the dollars fluctuate with variations

in the weight and fineness of the monetary standard, and thus defeat the expectation of the parties that the standard would be constant and the value relatively stable. Such, indeed, is the effect, and the covenant of the parties is to that extent abortive. But the disappointment of expectations and even the frustration of contracts may be a lawful exercise of power when expectation and contract are in conflict with the public welfare. 'Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity.' Norman v. Baltimore & O. R. Co., supra, pp. 307, 308. To that congenital infirmity this covenant succumbs."

In the Norman case (Norman v. Baltimore & O. R. Co., 294 U.S. 240 [79 L.Ed. 885, 55 S.Ct. 407]), cited in the Holyoke case, supra, the Supreme Court discussed (pp. 295 et seq.) the background and purposes of the Joint Resolution of 1933 -- in essence the purposes of establishing a monetary system not based upon gold and removal of gold as legal tender; discussed clauses of contracts providing for payment in gold, and held (p. 302) that the gold clauses in the bonds in that case were not contracts for payment in gold coin as a commodity but were contracts for payment of money; discussed (pp. 306-311) the power of Congress to regulate currency and to establish the monetary system for the country, and held (p. 311) that such gold clauses interfered with the policy of Congress in exercising that authority. The court noted (p. 315) that according to appellants' contentions, the indebtedness of governmental and industrial obligors under gold clause provisions must be met by an amount of currency determined by the former gold standard, whereas the receipts of such obligors would be determined under the new (non-gold) standard, and that dislocation of the domestic

economy would be caused by such a disparity of conditions. Then it was said (p. 316):

"We are not concerned with consequences, in the sense that consequences, however serious, may excuse an invasion of constitutional right. We are concerned with the constitutional power of the Congress over the monetary system of the country and its attempted frustration. Exercising that power, the Congress has undertaken to establish a uniform currency, and parity between kinds of currency, and to make that currency, dollar for dollar, legal tender for the payment of debts. . . . The contention that these gold clauses are valid contracts and cannot be struck down proceeds upon the assumption that private parties, and States and municipalities, may make and enforce contracts which may limit that authority. Dismissing that untenable assumption, the facts must be faced. We think that it is clearly shown that these clauses interfere with the exertion of the power granted to the Congress and certainly it is not established that the Congress arbitrarily or capriciously decided that such an interference existed."

In the present case, the trial court did not err in concluding that the Joint Resolution of 1973 was not repealed. The Joint Resolution is not unconstitutional. (See Holyoke Water Power Co. v. American Writing Paper Co., supra, 300 U.S. 324; Norman v. Baltimore & O. R. Co., supra, 294 U.S. 240.)

Appellants' contentions regarding the contractual doctrines of "Impossibility" and "Illegality" are to the effect that if it is impossible or illegal to pay the rent in gold coin, then it should be payable in gold bullion.[3/] A similar argument was rejected in

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3/ According to respondent, appellants originally

the Holyoke case, supra, 300 U.S. at pp. 334-335. The trial court herein did not err in concluding that the gold clause provision of the lease was not a contract for payment in gold coin or gold bullion, but was a contract for the payment of money.

The judgment is affirmed.

WOOD, P.J.

We concur:

LILLIE, J.

HANSON, J.

3/ (Con't) contended that payment should be in gold coin of the weight and fineness as it existed on October 8, 1929; and that appellants "shifted" their position on appeal, "acknowledging the impossibility and illegality of paying in gold coin." They now contend that payment should be in gold bullion.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-1632

ANNE T. HENDERSON and
HELEN T. WILKES,

Petitioners,

vs.

MANN THEATRES CORPORATION
OF CALIFORNIA, a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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II. ENFORCEMENT OF THE JOINT RESOLUTION OF 1933 DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Petitioners secondly contend that continued enforcement of the Joint Resolution, in light of the PVMA, violates the due process clause of the Fifth Amendment of the United States Constitution "in that it creates an arbitrary and irrational distinction between obligees for the payment of gold or the value thereof and purchasers of gold in the absence of a contract, or, in the alternative, obligees under contracts with a gold clause, and obligees under other kinds of contracts requiring payment in gold or the value thereof (e.g., gold futures contracts)."* (Pet. p. 3)

Petitioners recognize, as they must, that this Court upheld the constitutionality of the Joint Resolution against a due process attack on two occasions — *Norman, supra,* and *Holyoke Water Power Co., supra.* In those cases, every possible constitutional argument concerning due process and equal protection was advanced by skilled attorneys representing substantial creditors and debtors, as well as by the Solicitor General of the United States. This Court definitively held that the Joint Resolution of 1933 was a lawful exercise of the Congressional power to regulate the value of money (Const., Art. I, § 8).

Petitioners contend that the decisions in *Norman* and *Holyoke Water Power Co.* "justified and rationalized the Joint Resolution as necessary to support, and prevent circumvention of, contemporaneous legislation prohibiting private possession of gold. . . . Only in light of a prohibition

---

*The petition refers several times to "gold futures contracts" without defining them. Such contracts are not money debt contracts, but are obligations to deliver a specified weight of gold at a specific future date and are always classified as commodity contracts.

on holding gold did the Court in *Norman* and *Holyoke, supra,* find that the Joint Resolution is not irrational and therefore not violative of the Fifth Amendment." (Pet., pp. 9-10) Petitioners then state that the removal of all restrictions on ownership of gold by the 1973 amendment to the PVMA makes for an irrational and invidious discrimination. However, a review of the opinions in *Norman* and *Holyoke Water Power Co.* does not show that this Court's finding of constitutionality of the Joint Resolution was founded on prohibition of ownership of gold. Indeed, the first such prohibition was not enacted by Congress until some eight months after the Joint Resolution was passed. Rather, constitutionality of the Joint Resolution was based upon the premise that Congress has the power and duty to set the monetary standards of the United States by statute, and the Joint Resolution was a statutory designation of the allowable monetary standard in and after March, 1933.

Specifically, the Joint Resolution does not create an arbitrary or irrational discrimination between classes of creditors. All persons are free to deal in gold as a commodity, and thus to require delivery of gold which they have contracted to buy. No persons are free to require payment of a money obligation in American gold coin or its alleged equivalent market value as gold bullion. All citizens are in both categories. The legal and logical underpinning for this distinction was best summarized by this Court in *Holyoke Water Power Co.*:

> ". . . The Resolution touches gold as well as coin or currency whenever transactions in either are within the evil to be remedied. We learn from the preamble that 'provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amou[illegible]n money of the United States measured thereby,

while specifically repealing Sections 3 and 4 of the Gold Reserve Act of 1934. (Pet., p. 7). Those courts invoked the maxim that the expression of certain things in a statute necessarily involves exclusion of other things not expressed — *expressio unius est exclusio alterius.* See e.g., *Midland Co-op. Wholesale v. Ickes,* 125 F.2d 618, 625 (8 Cir., 1942). Nothing in petitioners' argument offsets the applicability and strength of this long accepted principle of statutory interpretation.

Lastly, petitioners contend that the PVMA legalized all "gold futures contracts" and that the rental clause in the ground lease is, in effect, a gold futures contract. (Pet., p. 7) This is simply another way of arguing that the rental clause deals with gold as a commodity. Instead, as noted above, the gold clause in petitioners' lease, as in similar contracts, sought to use gold coin minted by the United States Treasury as the measure of payment of the debt created by the lease. The Joint Resolution was intended by Congress to be the death knell of gold coinage and of any requirement of delivery of gold coins or their equivalent current value in payment of any debt. This Court held in *Norman, supra,* that the purpose of the Joint Resolution was to implement the Congressional and executive decisions to establish a monetary system not based upon gold, to remove gold as legal tender.

> "We are not concerned with consequences, in the sense that consequences, however serious, may excuse an invasion of constitutional right. *We are concerned with the constitutional power of the Congress over the monetary system of the country and its attempted frustration. Exercising that power, the Congress has undertaken to establish a uniform currency, and parity between kinds of currency, and to make that currency, dollar for dollar, legal tender for the payment of debts.* In the light of

> abundant experience, the Congress was entitled to choose such a uniform monetary system, *and to reject a dual system,* with respect to all obligations within the range of the exercise of its constitutional authority. The contention that these gold clauses are valid contracts and cannot be struck down proceeds upon the assumption that private parties, and States and municipalities, may make and enforce contracts which may limit that authority. Dismissing that untenable assumption, the facts must be faced. *We think that it is clearly shown that these clauses interfere with the exertion of the power granted to the Congress* and certainly it is not established that the Congress arbitrarily or capriciously decided that such an interference existed." (294 U.S. at 316; emphasis added.)

The Congressional intention to place all citizens under a uniform currency standard, not based on gold, is as strong today as it was in 1933. The United States continues to be engaged in a plan to phase out the special monetary character attributed to gold, both at a national and international level. Currently, with the introduction of special drawing rights, the recent gold sales by the International Monetary Fund, and the suspension of convertibility of dollars into gold by the United States, the process is nearly complete. Cong.Rec. § 6697 (Daily Ed., April 4, 1973)

Thus, the basic American monetary policy denying gold any ability to be the standard of value of our money was not affected by the removal of all restrictions on gold ownership. These monetary policies are as sound and vital today as in 1933, and continue to require prohibition of enforcement of gold value clauses such as in petitioners' ground lease.

". . . Here what was intended was to assure the payment of a money debt in dollars of a value as constant as that of gold. *Norman v. Baltimore & Ohio R. Co., supra,* p. 302; cf. *Feist v. Société Intercommunale Belge D'Electricité,* L.R. [1934] A.C. 161, 172, 173. The fact is of little moment that currency is characterized as a commodity in the verbiage of the covenant as long as it is currency. Cf. *Lipke v. Lederer,* 259 U.S. 557, 561, 562. Weasel words will not avail to defeat the triumph of intention when once the words are read in the setting of the whole transaction. So read, the end to be achieved is shown forth unmistakably as a payment, not a sale.

". . .

"A contract for the payment of gold as the equivalent of money, and *a fortiori* a contract for the payment of money measurable in gold, is within the letter of the Joint Resolution of June 5, 1933, and equally within its spirit." (300 U.S. at 336, 337.)

In the present case, of course, petitioners' gold value clause does not even use the word "commodity," and in no way is there a suggestion that the original lessor and lessee were dealing with gold as a commodity. Rather, the lease provides the creation of a debt for the use of land, and the gold value clause simply states alternative methods of payment. This provision for payment measured by 1929 gold dollars cannot be enforced and is as void under the Joint Resolution as the similar rent clause in *Holyoke Water Power Co.* See, also, *Norman v. Baltimore & Ohio R.R. Co.,* 294 U.S. 240, 302 (1935); *Guaranty Trust Co. v. Henwood,* 307 U.S. 247, 255 (1939); *Emery Bird Thayer Dry Goods Co. v. Williams,* 107 F.2d 965, 968-9 (8th Cir. 1939), *cert. den.* 309 U.S. 655 (1940).

Petitioners also refer in general to the legislative history of the 1973 PVMA amendments, contending that it "discloses a Congressional intent to permit gold to be treated as are all other goods." (Pet. pp. 6-7) Respondent does not deny that the PVMA's primary goal was to confer upon gold a status of open trading equal to that of the soybeans frequently mentioned in the petition. More to the point, however, are the statements of the sponsors of the PVMA amendments that Congress expressly intended to leave the Joint Resolution of 1933 in full effect. Compelling evidence to this effect is found in the testimony of Mr. Gonzalez, Chairman of the subcommittee in the House of Representatives that handled the amendments:

> "I want to emphasize that this would not mean that we intend to allow the writing of contracts in gold, or otherwise change the joint resolution on gold. Our intention is merely to allow individuals to buy, sell and own gold if and when it is possible to do this without sacrificing our national interest." 119 Cong.Rec. 16968 (May 29, 1973).

See, also, Cong.Rec. 16980 (May 29, 1973). Further, the various executive departments and independent agencies concerned with the monetary standards of this country have uniformly interpreted the PVMA as not repealing or modifying the Joint Resolution (Dept. of Treasury, Official Statement, Appendix B hereto; Federal Reserve Board; Federal Home Loan Bank Board). These interpretations are entitled to be given great weight by the courts. *U.S. ex rel Chapman v. Federal Power Commission,* 191 F.2d 796 (4th Cir. 1951), *aff'd,* 345 U.S. 153 (1953).

Petitioners contend that the California courts erroneously reasoned that the Congressional intention not to repeal the Joint Resolution by enactment of amendments to the PVMA was demonstrated by its silence as to the Joint Resolution,

freedom to purchase, hold and sell gold. The PVMA contained no provision alluding to the Joint Resolution, nor did it purport to restore gold coins as legal tender or to monetize gold in any other way.

However, apparently believing that the renewed right of ownership of gold restored life to the "gold value" clause in the ground lease, petitioners filed their complaint seeking recovery of $2,500 of gold coin of the United States or $19,300 in current legal tender as rent for January and February 1975. Respondent's answer denied the claim and asserted affirmative defenses of payment in full, illegality of the provision as interpreted by petitioners and impossibility of performance.

The trial court found, based upon the agreed facts, that the Joint Resolution was not repealed, either expressly or by implication, by the PVMA amendments, that the gold value clause of the ground lease is not a contract for delivery of gold bullion as a commodity but a contract for the payment of money, and that, as such, its enforcement is prohibited by the Joint Resolution. (A copy of the Findings of Fact and Conclusions of Law is attached as Appendix A.) The California Court of Appeal fully affirmed this judgment.

ARGUMENT

I. THE JOINT RESOLUTION OF 1933 WAS NOT REPEALED BY THE AMENDMENTS TO THE PAR VALUE MODIFICATION ACT.

Petitioners first contend that the Joint Resolution was expressly or impliedly repealed by the 1973 and 1974 amendments to the PVMA. This is plainly erroneous, as the courts below properly concluded.

First, there was no express repeal of the Joint Resolution in the PVMA amendments. Rather, the only express

repealer therein was of two statutes which dealt only with acquisition and use of gold (Sections 3 and 4 of the Gold Reserve Act of 1934). The Joint Resolution was not even mentioned in any PVMA amendment.

Second, there was no implied repeal of the Joint Resolution by enactment of the PVMA amendments. The two statutes deal with very different subject matters — the Joint Resolution with the demonetization of gold, the PVMA with ownership and use of gold as a commodity. Nothing is cited by petitioners, nor could it be, to demonstrate that the PVMA was intended to give gold a renewed monetary standing. Indeed, the language of the 1974 amendment to the PVMA emphasizes the distinction between private ownership of gold and government monetary standards.*

Petitioners contend that the California Court of Appeal erred in utilizing the distinction between unrestricted ownership and trading in gold as a commodity and the prohibition of gold as a monetary standard contained in the Joint Resolution (Pet. p. 6). There is no error. Such a distinction was expressly intended by Congress. The distinction between contracts treating gold as a commodity and as a monetary standard was expressly noted by this Court in cases upholding the constitutionality of the Joint Resolution. *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U.S. 324 (1937), flatly rejected the contention that a gold value clause in a lease was in effect a contract for the purchase and sale of gold, even though the clause used the term "commodity":

---

* ". . . [T]his section shall take effect either on December 31, 1974, or at any time prior . . . that international monetary reform shall have proceeded to the point where elimination of regulations on private ownership of gold will not adversely affect the United States' international monetary position."

In October 1929, a 99-year ground lease of land in Los Angeles, improved by a movie theatre, was entered into between the predecessors in interest of the parties. Petitioners became the owners of the underlying ground in about 1960, and respondent became the lessee thereafter. The rental clause of the ground lease provided:

"1st - RENTAL

"The rental for such ninety-nine (99) year term shall be the sum of One Million Four Hundred Fifty-Seven Thousand Five Hundred Dollars ($1,457,500.00), which sum the lessee agrees to pay the lessors in installments as follows:

"Seven Hundred Fifty Dollars ($750.00) on the first day of each and every calendar month of said term commencing November 1, 1929, to and including May 1, 1934;

"Twelve Hundred Fifty Dollars ($1,250.00) on the first day of each and every calendar month of said term commencing June 1, 1934, to and including October 1, 2028.

"The lessee agrees to pay said rentals to the lessors in gold coin of the United States of America of the present standard of weight and fineness (one dollar containing twenty-five and eight-tenths grains of which twenty-three and twenty-two hundredths grains are fine gold) or its equivalent in lawful money of the United States of America, at such place in the City of Los Angeles, California, as the lessors may, from time to time, in writing, designate as the place for the payment of the rent. But the lessee may make such rental payments by bank check in accordance with prevailing business practices, and the place for the payment of the rent shall be at the Holly-

wood Office of California Bank in the City of Los Angeles, California, until otherwise specified by the lessors as aforesaid."

In June 1933, Congress enacted the Joint Resolution of 1933 (hereafter "Joint Resolution") as a result of the fundamental monetary change then being accomplished, popularly known as "going off the gold standard." The Joint Resolution (now 31 United States Code Section 463) provided that every provision in an obligation that purported to give the obligee the right to require payment in gold, or in an amount in money measured thereby, is against public policy, and that every obligation containing such a provision is discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender.

Respondent and its predecessors have been paying rent in legal tender in the exact amount set forth in the lease, which, since June 1, 1934, has been $1,250 per month. Petitioners accepted such amount as payment in full of the rent until January 1975, when they demanded payment in the amount of $1,250 "in gold coin of the United States of America, of the standard of weight and fineness in use on October 8, 1929 . . . , or its equivalent in lawful money of the United States of America . . ." which the petitioners contended was $9,650 in current dollars (Complt, p. 3). Respondent refused the demand and continued to pay $1,250 per month as rent.

Petitioners based their demand for American gold dollars, or an eightfold increase in current dollars, upon the passage by Congress in 1973 of amendments to The Par Value Modification Act, Public Law 93-110 (hereinafter referred to as "PVMA"). The amendments repealed provisions of the Gold Reserve Act of 1934, which had made most ownership of gold by American citizens illegal, and allowed Americans for the first time in almost 40 years complete

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IN THE

Supreme Court of the United States

OCTOBER TERM 1976
No. 76-1632

ANNE T. HENDERSON and
HELEN T. WILKES,

Petitioners,

vs.

MANN THEATRES CORPORATION
OF CALIFORNIA, a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Because there is no issue of national importance raised by petitioners' request that a writ of certiorari issue to review the decision of the California Court of Appeal (affirming the judgment entered by the trial court in favor of respondent), the petition should be denied.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, is printed as Appendix B to the petition for writ of certiorari.

STATEMENT OF THE CASE

Petitioners' statement of the case is misleadingly incomplete, both in text and in quotation of the basic contractual document involved. A full summary of the agreed facts upon which the case was tried is necessary for accurate analysis of petitioners' arguments.

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obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts.' Accordingly, all such provisions are declared to be against public policy, and every obligation, heretofore or hereafter incurred, though it contain such provisions, shall be payable, dollar for dollar, in legal tender at the time of payment. *Transactions for the sale or delivery of gold for industrial purposes are not within the evil to be remedied, and so are not within the statute.* Cf. Executive Order of April 5, 1933, and August 28, 1933; Orders of the Secretary of the Treasury, December 28, 1933 and January 15, 1934; Emergency Banking Act of March 9, 1933, 48 Stat. 1, 2, § 3. An obligation to make delivery upon a *bona fide* sale is not fairly to be classified as an obligation 'payable in money' (Joint Resolution, subdivision (b)), or so we now assume. *But very definitely, the evil does include transactions whereby gold, coined or uncoined, is to be delivered in satisfaction of a debt expressed in terms of dollars, payment, not sale, being then the end to be achieved. As definitely, indeed more obviously, the evil includes transactions whereby a debt is to be discharged, not in bullion, but in dollars, if the number of the dollars is to be increased or diminished in proportion to the diminution or the increase of the gold basis of the currency. Both forms of obligation are illustrations of the very mischief that Congress sought to hit.*" (300 U.S. at 338-9; emphasis added.)

Petitioners here are in exactly the same position as the lessor in *Holyoke Water Power Co.* They desire delivery of gold, in coins or equivalent gold, in satisfaction of a debt expressed in terms of dollars, payment, not purchase of gold, being the end to be achieved. This is the very "evil" pro-

hibited by the Joint Resolution. Full legalization of ownership of gold has not placed American money back on the gold standard.

CONCLUSION

Contrary to petitioners' assertion that this is a case of first impression in the United States, it was over 40 years ago that this Court definitively answered the arguments now raised again by petitioners. The Joint Resolution was not repealed by the PVMA amendments, expressly or impliedly, and it continues to be a logical and proper exercise of the Congressional power to regulate the value of our money.

In essence, petitioners are unhappy that they do not have a possible hedge against inflation by using gold as a standard for the monetary value of the rent. But, as said by Mr. Justice Cardozo in *Holyoke Water Power Co.*:

"In last analysis, the case for the petitioner amounts to little more than this, that the effect of the Resolution in its application to these leases is to make the value of the dollars fluctuate with variations in the weight and fineness of the monetary standard, and thus defeat the expectation of the parties that the standard would be constant and the value relatively stable. Such, indeed, *is* the effect, and the covenant of the parties is to that extent abortive. But the disappointment of expectations and even the frustration of contracts may be a lawful exercise of power when expectation and contract are in conflict with the public welfare. 'Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity.' *Norman v. Baltimore & Ohio R. Co., supra,* pp. 307, 308. To that congenital infirmity this covenant succumbs." (300 U.S. at 341.)

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Attorneys for Respondent.

APPENDIX A

FILED
JAN 21 1976
CLARENCE E. CABELL, County Clerk
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ANNE T. HENDERSON and HELEN T. WILKES, Plaintiffs, vs. MANN THEATRES CORPORATION OF CALIFORNIA, a Corporation, and DOES I through V, Inclusive, Defendants.	No. C 113 808 FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for non-jury trial on November 3, 1975, in Department 1 of the above entitled Court, the Honorable William P. Hogoboom, Judge presiding, plaintiffs and defendant being represented by their respective attorneys of record, the facts being fully stipulated by and between said parties, and the cause briefed, argued and submitted for decision; wherefore, the Court being fully advised in the premises, now renders its decision as follows:

FINDINGS OF FACT

1. On or about October 8, 1929, la Belle Townsend and Wilber Townsend leased to Main Holding Company, a California corporation, certain real property located at and known as 6508 Hollywood Boulevard, Los Angeles, California, under a written lease.

2. Thereafter, by mesne conveyances, the lessee's interest in said lease was duly assigned to defendant. Defendant has been the lessee of said property since on or about June 29, 1973.

3. By mesne conveyances, the lessors' interest in said lease was duly conveyed to plaintiffs as tenants in common.

4. Said lease, dated October 8, 1929, provides for rental payments for the property leased, as follows:

"1st - RENTAL

"The rental for such ninety-nine (99) year term shall be the sum of One Million Four Hundred Fifty-Seven Thousand Five Hundred Dollars ($1,457,500.00), which sum the lessee agrees to pay the lessors in installments as follows:

"Seven Hundred Fifty Dollars ($750.00) on the first day of each and every calendar month of said term commencing November 1, 1929, to and including May 1, 1934;

"Twelve Hundred Fifty Dollars ($1250.00) on the first day of each and every calendar month of said term commencing June 1, 1934, to and including October 1, 2028.

"The lessee agrees to pay said rentals to the lessors in gold coin of the United States of America of the present standard of weight and fineness (one dollar

containing twenty-five and eight-tenths grains of which twenty-three and twenty-two hundredths grains are fine gold) or its equivalent in lawful money of the United States of America, at such place in the City of Los Angeles, California, as the lessors may, from time to time, in writing, designate as the place for the payment of the rent. But the lessee may make such rental payments by bank check in accordance with prevailing business practices, and the place for the payment of the rent shall be at the Hollywood Office of California Bank in the City of Los Angeles, California, until otherwise specified by the lessors as aforesaid."

5. Since June 1, 1934, defendant and its predecessors have paid rental for the real property in the amount of $1250 each month. Said sum of $1250 was paid by defendant to plaintiffs as rent for each of the months of January and February 1975 in legal tender money of the United States. Defendant has refused to pay the sum of $1250 in gold coin of the United States of America of the weight and fineness in use on October 8, 1929 (one dollar containing twenty-five and eight-tenths grains, of which twenty-three and twenty-two hundredths grains were fine gold) as rent for either of the months of January or February 1975.

6. On or about June 5, 1933, the United States Congress enacted Section 463 of Title 31 United States Code (commonly known as the Joint Resolution of 1933), which provided in full as follows:

"Provision for payment of obligations in gold prohibited; uniformity in value of coins and currencies

"(a) Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particu-

lar kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

"(b) As used in this section, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations. June 5, 1933, c. 48, § 1, 48 Stat. 113."

7. In September 1973, the United States Congress enacted Public Law 93-110, 93rd Congress, H.R. 6912, which provided in relevant part as follows:

"AN ACT to amend the Par Value Modification Act, and for other purposes:

". . .

"Sec. 3. (a) Sections 3 and 4 of the Gold Reserve Act of 1934 (31 U.S.C. 442 and 443) are repealed.

"(b) No provision of any law in effect on the date of enactment of this Act, and no rule, regulation, or order

under authority of any such law, may be construed to prohibit any person from purchasing, holding, selling, or otherwise dealing with gold.

"(c) The provisions of this section, pertaining to gold, shall take effect when the President finds and reports to the Congress that international monetary reform shall have proceeded to the point where elimination of regulations on private ownership of gold will not adversely affect the United States' international monetary position."

8. In July 1974, the United States Congress enacted Public Law 93-373, 93rd Congress, S. 2665, 88 Stat. 445, which provided in relevant part as follows:

"Sec. 2. Subsections 3(b) and (c) of Public Law 93-110 (87 Stat. 353) are repealed and in lieu thereof add the following:

"(b) No provision of any law in effect on the date of enactment of this Act, and no rule, regulation, or order in effect on the date sub-sections (a) and (b) become effective may be construed to prohibit any person from purchasing, holding, selling, or otherwise dealing with gold in the United States or abroad.

"(c) The provisions of subsections (a) and (b) of this section shall take effect either on December 31, 1974, or at any time prior to such date that the President finds and reports to Congress that international monetary reform shall have proceeded to the point where elimination of regulations on private ownership of gold will not adversely affect the United States' international monetary position."

Said provisions became effective on December 31, 1974.

9. The Court finds in all respects as set forth in the Conclusions of Law following these Findings of Fact.

CONCLUSIONS OF LAW

The Court concludes:

1. In all respects as set forth in the foregoing Findings of Fact.

2. Said findings having been made upon issues which are determinative of the cause, any further findings or findings upon issues other than those embraced in the foregoing findings would be immaterial and are not made for that reason.

3. Enforcement of the gold clause provision of the lease of October 8, 1929 pertaining to payment of the rent in gold coin of the United States is prohibited by the provisions of the Joint Resolution of 1933, 31 U.S.C. § 463.

4. Defendant is not obligated to make payment in gold coin of the United States of America of the weight and fineness in effect on October 8, 1929, or its equivalent in lawful money of the United States. 31 U.S.C. §§ 315b, 446, 463.

5. The Joint Resolution of 1933, 31 U.S.C. § 463, was not repealed, either expressly or by implication, by the 1973 amendment of the Par Value Modification Act, Public Law 93-110, 93rd Congress, H.R. 6912.

6. The gold clause provision of the lease of October 8, 1929 was not and is not a contract for payment in gold coin or gold bullion as a commodity, but was and is a contract for the payment of money.

7. Defendant has duly and fully performed all of the conditions of said lease of October 8, 1929 to be performed on its part, and, in particular, has fully discharged its obligation to pay rent to plaintiffs for the months of January and February 1975.

8. Defendant is entitled to judgment that plaintiffs take nothing and that defendant recover its costs herein incurred.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: JAN 21 1976.

HOGOBOOM
JUDGE

APPENDIX B

Department of the Treasury
Washington, D.C. 20220
Telephone WO 4-2041

NEWS

FOR RELEASE 3:30 P.M., EST,
MONDAY, DECEMBER 9, 1974

Statement on Gold Clause Resolution

The repeal of the restrictions on private ownership of gold effective December 31, 1974, has prompted a number of inquiries on the continuing validity of the Gold Clause Joint Resolution enacted by Congress on June 5, 1933. This statement is issued by the Treasury Department, after consultation with other concerned Government agencies, to help clarify the application of this law.

The Gold Clause Joint Resolution (31 U.S.C. 463) provides that "every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy . . . ." This law mandates that such provisions shall be discharged upon payment, dollar for dollar, in the current legal tender. It is Treasury's view that the Gold Clause Joint Resolution continues to apply after the lifting of restrictions on bullion ownership.

Under the Resolution a contract clause providing for payment in gold, or in United States dollars equivalent to a certain amount of gold, is not enforceable if the subject of the contract is something other than gold, so that gold as a commodity has no relationship to the business being transacted. In such a case, gold would be used solely for the purpose of establishing the value of the obligations. This

view is based on judicial decisions which held unenforceable a lease providing for payment in gold bullion as one method of rent settlement, since the intention of the parties by using gold in the contract was solely to stabilize the dollar value of the rent. *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U.S. 324 (1937); *Emery Bird Thayer Dry Goods Co.* v. *Williams*, 107 F. 2d 965 (1939). Similarly, loans or certificates of deposit repayable in gold, or in an amount of dollars measured in terms of gold, would be unenforceable.

In contrast, if gold as a commodity is the subject matter of the contract, then the Resolution would not bar enforcement according to its terms. For example, a present sale of gold bullion or coins and a sale of gold for future delivery (*i.e.*, a gold futures contract) fall outside the Resolution. A similar conclusion has been reached with respect to a contractual provision giving a shareholder, in an organization with assets consisting of gold, the right to redeem his equity, either in those assets, or in an equivalent amount of dollars at the then current market price, would be enforceable.

Contracts containing multiple currency clauses, as in the past, are unenforceable under the Resolution. The reason for this is that in the late 1930's the Supreme Court construed the Resolution to prohibit enforcement of multi-currency contracts.

Multi-currency clauses are now common in contracts in international financial markets. For example, bonds are issued and denominated in "Eurcos" which provide for payment in a number of European currencies in an amount measured by an index composed of these currencies. The Secretary of the Treasury has indicated that consideration of a change in the law at the next session of Congress

to allow American businessmen to deal in this kind of instrument would be desirable.

The United States law making gold clauses unenforceable has been in effect solely during the period in which private ownership of gold by United States citizens was prohibited. Nonetheless, there is nothing inconsistent between private ownership of gold and the Gold Clause Joint Resolution. Canada, France and Germany, for example, have for some years allowed private ownership of gold while prohibiting gold clauses.

Finally, this area of the law is subject to varying legal interpretations and, as in other cases of statutory construction, the final arbiter must be the courts.